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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 J & J SPORTS PRODUCTIONS, INC.,

14 Plaintiff,

15 Case No.: 3:10-cv-05123-BZ

16 vs.

17 LAURA SYLVIA MENDOZA-GOVAN,  
18 individually and d/b/a KIMBALL'S SPORTS  
19 BAR a/k/a KIMBALLS CARNIVAL,

20 Defendant.

21 PLAINTIFF'S NOTICE OF MOTION  
22 AND MOTION TO STRIKE  
23 DEFENDANT'S AFFIRMATIVE  
24 DEFENSES; MEMORANDUM OF  
25 POINTS AND AUTHORITIES.

Date: TO BE DETERMINED  
Time: TO BE DETERMINED  
Court: TO BE DETERMINED  
Judge: TO BE DETERMINED

26 TO THE HONORABLE COURT, THE DEFENDANT AND HIS ATTORNEYS OF RECORD:

27 PLEASE TAKE NOTICE that this matter may be heard in Courtroom G, 15th Floor, of  
the United States District Court, Northern District of California, located at 450 Golden Gate  
Avenue, San Francisco, California 94102, Plaintiff J & J Sports Productions, Inc., by and  
through counsel, will move this Court for an Order striking the affirmative defenses of  
Defendant Laura Sylvia Mendoza-Govan (hereinafter "Defendant") (Docket No. 6).

28 This Motion will be made on the grounds that Defendant's Affirmative Defenses are  
legally insufficient under the Federal Rules of Civil Procedure and applicable precedent.

1       The Motion will be based on this Notice of Motion, the Memorandum of Points and  
2 Authorities served and filed herewith, and such further oral and documentary evidence or  
3 argument as may be presented at the hearing on Plaintiff's Motion.

4  
5 Dated: March 10, 2011

*/s/ Thomas P. Riley*

6       **LAW OFFICES OF THOMAS P. RILEY, P.C.**

7       By: Thomas P. Riley

Attorneys for Plaintiff

J & J Sports Productions, Inc.

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## TABLE OF CONTENTS

2	<b>MEMORANDUM OF POINTS AND AUTHORITIES</b>	3
3	<b>STATEMENT OF THE ISSUE</b>	3
4	<b>STATEMENT OF FACTS</b>	3
5	<b>ARGUMENT</b>	4
6	I. DEFENDANT FAILS TO SATISFY THE LEGAL STANDARD NECESSARY TO SUSTAIN ANY AFFIRMATIVE DEFENSE, THEREFORE, ALL OF DEFENDANT'S AFFIRMATIVE DEFENSES MUST BE STRICKEN.	4
7	A. <u>First Affirmative Defense (No Public Exhibition)</u>	6
8	B. <u>Second Affirmative Defense (No Exclusive License)</u>	7
9	C. <u>Third Affirmative Defense (Standing)</u>	7
10	D. <u>Fourth Affirmative Defense (Fault Of Others)</u>	8
11	E. <u>Fifth And Sixth Affirmative Defenses (Not In Violation)</u>	8
12	F. <u>Seventh Affirmative Defense (Plaintiff Not Aggrieved)</u>	8
13	G. <u>Eighth Affirmative Defense (Estoppel, Waiver And Laches)</u>	9
14	H. <u>Ninth Affirmative Defense (Statutes Of Limitations)</u>	11
15	I. <u>Tenth Affirmative Defense (Statutory Exemptions)</u>	11
16	J. <u>Eleventh Affirmative Defense (No Intent)</u>	12
17	K. <u>Twelfth Affirmative Defense (Failure To State A Claim)</u>	12
18	L. <u>Thirteenth Affirmative Defense (Good Faith)</u>	13
19	M. <u>Fourteenth Affirmative Defense (No Basis For Attorney's Fees)</u>	14
20	N. <u>Fifteenth Affirmative Defense (Service Of Process)</u>	14
21	O. <u>Sixteenth Affirmative Defense (Rule 11 Sanctions)</u>	15
22	P. <u>Seventeenth Affirmative Defense (No Conversion)</u>	15
23	<u>Eighteenth Affirmative Defense (No Unfair Business Practices)</u>	15
24	Q. <u>Nineteenth Affirmative Defense (Personal Jurisdiction)</u>	15

1	R.	<u>Twentieth Affirmative Defense (No Recovery Under Sections 605 And 553).</u>	. . . . .	15
2	S.	<u>Twenty-First Affirmative Defense (Reservation Of Rights).</u>	. . . . .	16
3	II.	PLAINTIFF WILL BE PREJUDICED IF THE AFFIRMATIVE DEFENSES ARE NOT STRICKEN.	. . . . .	16
4				
5	<b>CONCLUSION</b>	. . . . .		17
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				
26				
27				
28				

## TABLE OF AUTHORITIES

## CASES

<u>Allen v. Wright,</u>	468 U.S. 737 (1984)	7
<u>Barlow v. U.S.,</u>	32 U.S. 404 (1833)	13
<u>Barnes v. AT &amp; T Pension Benefit,</u>	718 F.Supp.2d 1167 (N.D.Cal. 2010).	4, 16
<u>Bell Atlantic Corp. v. Twombly,</u>	550 U.S. 544 (2007).	4
<u>Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York,</u>	278 F.Supp.2d 313 (S.D.N.Y.2003)	17
<u>Directv, Inc. v. Webb,</u>	545 F.3d 837 (9th Cir. 2008).	11
<u>Directv Inc., v. Weikel,</u>	2005 WL 1243378 (D.N.J. May 25, 2005).	9
<u>Doyle v. Illinois Central R. Co.,</u>	2008 WL 4838556 (E.D.Cal. Nov. 5, 2008)	15
<u>EEOC v. Bay Ridge Toyota, Inc.,</u>	327 F.Supp.2d 167 (E.D.N.Y. 2004)..	17
<u>Fantasy, Inc. v. Fogerty,</u>	984 F.2d 1524 (9th Cir. 1993)	4
<u>Federal Deposit Ins. Corp. v. Main Hurdman,</u>	655 F.Supp. 259 (E.D.Cal. 1987)	5, 7, 12
<u>G &amp; G Closed Circuit Events, LLC v. Nguyen,</u>	2010 WL 3749284 (N.D.Cal. Sept. 23, 2010)	passim
<u>Hynix Semiconductor Inc. v. Rambus Inc.,</u>	2007 WL 4062845 (N.D.Cal. Nov. 15, 2007)	16
<u>Integrated Sports Media v. Canseco,</u>	Case No. 2:10-cv-07392-RSWL-AJW (C.D.Cal. Feb. 23, 2011)	8
<u>Italia Marittima, S.P.A. v. Seaside Transp. Services, LLC,</u>	2010 WL 3504834 (N.D.Cal. Sept. 7, 2010)	10

1	<u>Italiani v. Metro-Goldwyn-Mayer Corp.,</u> 45 Cal.App.2d 464 (1941) . . . . .	11
2	<u>J &amp; J Sports Productions, Inc. v. Coyne,</u> 2011 WL 227670 (N.D.Cal. Jan. 24, 2011) . . . . .	6, 11-14
4	<u>J &amp; J Sport Productions, Inc., v. Lowe,</u> Case No. 3:10-cv-04201-CRB (N.D.Cal. March 3, 2011) . . . . .	6
6	<u>J &amp; J Sports Productions, Inc. v. Montanez,</u> 2010 WL 5279907 (E.D.Cal., Dec. 13, 2010). . . . .	passim
8	<u>J &amp; J Sports Productions, Inc. v. Soto,</u> 2010 WL 3911467 (S.D.Cal. Sept. 28, 2010). . . . .	passim
10	<u>Jones v. Community Redevelopment Agency,</u> 733 F.2d 646 (9th Cir. 1984). . . . .	5
12	<u>Kling v. Hallmark Cards, Inc.,</u> 225 F.3d 1030 (9th Cir. 2000) . . . . .	10, 11
14	<u>Pepsico, Inc. v. J.K. Distributors, Inc.,</u> 2007 WL 2852647 (C.D.Cal. Sept. 14, 2007) . . . . .	5, 13
15	<u>Qarbon.com Inc. v. eHelp Corp.,</u> 315 F.Supp.2d 1046 (N.D.Cal. 2004). . . . .	9
17	<u>Russell v. Todd,</u> 309 U.S. 280 (1940) . . . . .	10
19	<u>Securities &amp; Exchange Comm'n v. Internet Solutions for Business, Inc.,</u> 509 F.3d 1161 (9th Cir. 2007) . . . . .	14
21	<u>Security People, Inc. v. Classic Woodworking, LLC,</u> 2005 WL 645592 (N.D.Cal. March 4, 2005) . . . . .	5
22	<u>Solis v. Couturier,</u> 2009 WL 2022343 (E.D.Cal., July 8, 2009) . . . . .	9
24	<u>Solis v. Zenith Capital, LLC,</u> 2009 WL 1324051 (N.D. Cal. May 8, 2009) . . . . .	16
25	<u>Wine Group, LLC v. L And R Wine Co.,</u> 2011 WL 130236 (E.D.Cal. Jan. 14, 2011) . . . . .	4
27	<u>Wyler Summit Partnership v. Turner Broadcasting System, Inc.,</u> 235 F.3d 1184 (9th Cir. 2000) . . . . .	10
28		

1           Wyshak v. City Nat'l Bank,  
 2                 607 F.2d 824 (9th Cir. 1979). . . . .

5

2           **STATUTES AND RULES**

3           47 U.S.C. § 553.	. . . . .	passim
4           47 U.S.C. § 605.	. . . . .	passim
5           Fed. R. Civ. P. 8.	. . . . .	4, 16
6           Fed. R. Civ. P. 12.	. . . . .	passim
7           Fed. R. Evid. 201	. . . . .	6
8           Cal. Bus. & Prof. Code § 17200, <u>et seq.</u>	. . . . .	8, 10, 11
9           Cal. Code Civ. Proc. § 338	. . . . .	11

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**MEMORANDUM OF POINTS AND AUTHORITIES****STATEMENT OF THE ISSUE**

Whether any or all of the twenty-one affirmative defenses contained in the Defendant's Answer in response to Plaintiff's Complaint must be stricken.

**STATEMENT OF FACTS**

Plaintiff J & J Sports Productions, Inc. (hereinafter "Plaintiff"), was granted the exclusive nationwide commercial distribution rights to "*Firepower*" : *Manny Pacquiao v. Miguel Cotto, WBO Welterweight Championship Fight Program*, telecast nationwide on Saturday, November 14, 2009 (hereinafter the "Program"). Complaint ¶ 9 (Docket No. 1). Plaintiff's distribution rights encompassed all undercard events as well as the main event. Id. Pursuant to the contract granting Plaintiff its distribution rights, Plaintiff entered into sub-licensing agreements with various commercial establishments to permit the public exhibition of the Program. Id. at ¶ 10. Without the authorization of Plaintiff, Defendant unlawfully intercepted and exhibited the Program at their commercial establishment located at 215 Washington Street, Oakland, California 94607. As a result of this, Plaintiff brought this action against Defendant for violations of 42 U.S.C. § 605, et seq. and 42 U.S.C. § 605, et seq., as well as violations of California law. See Complaint.

On February 17, 2011, Defendant filed an Answer denying the allegations raised by Plaintiff in its Complaint. See Answer (Docket No. 6); along with the Answer, Defendant also set forth twenty-one affirmative defenses. See id. Plaintiff now brings this Motion to Strike Defendant's affirmative defenses and reservation.

## ARGUMENT

1           I. DEFENDANT FAILS TO SATISFY THE LEGAL STANDARD NECESSARY TO  
 2 SUSTAIN ANY AFFIRMATIVE DEFENSE, THEREFORE, ALL OF  
 3 DEFENDANT'S AFFIRMATIVE DEFENSES MUST BE STRICKEN.

4           Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, a "court may strike from a  
 5 pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous  
 6 matter." Fed. R. Civ. P. 12(f). The Ninth Circuit has defined "immaterial matter" as matter that  
 7 "has no essential or important relationship to the claim for relief or the defenses being pleaded,"  
 8 and "impertinent matter" as "statements that do not pertain, and are not necessary, to the issues  
 9 in question." Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other  
 10 grounds, 510 U.S. 517 (1994). As discussed herein, each of the twenty-nine affirmative defenses  
 11 set forth by Defendant are insufficient and thus should be stricken.

12           "In responding to a pleading, a party must affirmatively state any avoidance or  
 13 affirmative defense[.]" Fed. R. Civ. P. 8(c)(1). The Federal Rules of Civil Procedure require, "a  
 14 'showing', rather than a blanket assertion, of entitlement to relief." Bell Atlantic Corp. v.  
 15 Twombly, 550 U.S. 544, 555, n. 3 (2007). Although the Ninth Circuit has not yet determined  
 16 whether to apply the Twombly standard to affirmative defenses, this is the developing trend in  
 17 the district courts. In Barnes v. AT & T Pension Benefit, 718 F.Supp.2d 1167, 1172 (N.D.Cal.  
 18 2010), the Northern District of California observed that, "the vast majority of courts presented  
 19 with the issue have extended Twombly's heightened pleading standard to affirmative defenses,"  
 20 Id. at 1171, and found, "the reasoning of the courts that have applied the heightened pleading  
 21 standard persuasive." Id. at 1172; see also Wine Group, LLC v. L And R Wine Co., 2011 WL  
 22 130236, \*2 (E.D.Cal. Jan. 14, 2011). In this case, some of the defenses propounded by  
 23 Defendant are boilerplate recitations that provide no factual support linking them to the issues  
 24 herein. See Answer at 2-6. (Those defenses that are "boilerplate" are 4, 8, 9, 12, 14, 15, 16, 19  
 25 and 21). For this reason alone, these affirmative defenses should be stricken.

26           Next, even if the Twombly standard does not apply, the defenses are still insufficient  
 27 under established Ninth Circuit precedent. "Where an affirmative defense simply states a legal  
 28 conclusion or theory without the support of facts explaining how it connects to the instant case, it

1 is insufficient and will not withstand a motion to strike.” Pepsico, Inc. v. J.K. Distributors, Inc.,  
 2 2007 WL 2852647, \*2 (C.D.Cal. Sept. 14, 2007) citing Jones v. Community Redevelopment  
 3 Agency, 733 F.2d 646, 649 (9th Cir.1984). In this case, as noted above, several affirmative  
 4 defenses are boilerplate, devoid of facts and circumstances that link them to the instant case. See  
 5 Answer at 2-6.

6 An affirmative defense is also insufficient if it does not provide the plaintiff with “fair  
 7 notice” of the defense. Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979). While an  
 8 “extensive exposition of the underlying facts” is not necessary for an affirmative defense to  
 9 succeed, the Defendant must establish some connection between the defense and the case. See  
 10 Security People, Inc. v. Classic Woodworking, LLC, 2005 WL 645592, \*2 (N.D.Cal. March 4,  
 11 2005). Next, “[w]ith respect to substantive insufficiency, a motion to strike an affirmative  
 12 defense is proper when the defense is insufficient as a matter of law.” Id. at \*3.

13 Finally, several affirmative defenses should be stricken because they are not “affirmative  
 14 defenses” at all. “Affirmative defenses plead matters extraneous to the plaintiff's prima facie  
 15 case, which deny plaintiff's right to recover, even if the allegations of the complaint are true.”  
 16 Federal Deposit Ins. Corp. v. Main Hurdman, 655 F.Supp. 259, 262 (E.D.Cal. 1987), citing  
 17 Gomez v. Toledo, 446 U.S. 635, 640-41 (1980). “In contrast, denials of the allegations in the  
 18 Complaint or allegations that the Plaintiff cannot prove the elements of his claims are not  
 19 affirmative defenses.” G & G Closed Circuit Events, LLC v. Nguyen, 2010 WL 3749284, \*2  
 20 (N.D.Cal. Sept. 23, 2010). In J & J Sports Productions, Inc. v. Soto, 2010 WL 3911467 at \*1  
 21 (S.D.Cal. Sept. 28, 2010), the district court struck several affirmative defenses that merely  
 22 denied an element of plaintiff's prima facie case without leave to amend. In this regard,  
 23 affirmative defenses 1, 2, 4-7, 12, 14, 17, 18 and 20 are immaterial and redundant, and should be  
 24 stricken.

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1       On March 3, 2011 the Honorable Charles R. Breyer of the Northern District struck all 21  
 2 affirmative defenses raised in the case of J & J Sport Productions, Inc., v. Lowe, Case No. 3:10-  
 3 cv-04201-CRB (N.D.Cal. March 3, 2011) (Docket No. 29). Of the 21 defenses stricken, only  
 4 four were stricken without prejudice. Id.<sup>1</sup> While not identical, the affirmative defenses raised in  
 5 Lowe have significant overlap with those filed herein. Counsel for the parties herein were also  
 6 counsel for the parties in Lowe.<sup>2</sup> As such, both parties are readily familiar with the affirmative  
 7 defenses addressed in Lowe. See Lowe, Case No. 3:10-cv-04201-CRB (Docket No. 13,  
 8 Plaintiff's Motion to Strike). Plaintiff requests that the Court take judicial notice of the Lowe  
 9 pleadings. Fed.R.Evid. 201(b). Nonetheless, as the Lowe opinion itself does not address the  
 10 specific defenses in detail, Plaintiff's arguments below are not dependent on Lowe.

11       In J & J Sports Productions, Inc. v. Montanez, 2010 WL 5279907 (E.D.Cal., Dec. 13,  
 12 2010), the Eastern District ruled upon a substantially similar motion and held that all fourteen of  
 13 defendant's affirmative defenses should be stricken. Similarly, in Soto, supra, the Southern  
 14 District struck all of Defendant's affirmative defenses, many without leave to amend. Of those  
 15 defenses for which leave to amend was granted, the Soto Court cautioned that, "any amended  
 16 answer must put forth sufficient legal defenses supported by specific factual allegations.  
 17 Defendant's current pleadings fail to place [Plaintiff] on notice about the affirmative defenses at  
 18 issue and Defendants should not waste the Court's or Plaintiff's time responding to further bare-  
 19 bones allegations." Soto, 2010 WL 3911467 at \*2; see also J & J Sports Productions, Inc. v.  
 20 Coyne, 2011 WL 227670, \*1 (N.D.Cal. Jan. 24, 2011) ("Defendants are cautioned not to re-  
 21 assert affirmative defenses absent a legitimate basis in fact and law for doing so.").

22       A.      First Affirmative Defense (No Public Exhibition).<sup>3</sup>

23       In her first affirmative defense, Defendant states that if the Program was shown, it "was  
 24 not exhibited or shown to patrons, the public or on a non-private use basis." Answer at 2. This is

25  
 26 <sup>1</sup> Those defenses stricken without prejudice were "estoppel, waiver and laches", "insufficient service of process",  
 "personal jurisdiction" and "respondeat superior". The latter defense is not raised herein.

27 <sup>2</sup> The Lowe decision was entered after Defendant filed her Answer herein.

28 <sup>3</sup> The individual affirmative defenses are addressed irrespective of the application of Twombly.

1 a denial of liability, not an affirmative defense. “Affirmative defenses plead matters extraneous  
 2 to the plaintiff’s prima facie case, which deny plaintiff’s right to recover, *even if the allegations*  
 3 *of the complaint are true.*” Federal Deposit Ins. Corp., 655 F.Supp. at 262. Plaintiff alleges that  
 4 the Program was shown commercially. Complaint ¶ 12. As such, this defense should be  
 5 stricken.

6 B. Second Affirmative Defense (No Exclusive License).

7 Defendant’s second affirmative defense is that “Plaintiff did not have an exclusive  
 8 license to the Program.” Answer at 6. This also contradicts a factual allegation of the Complaint.  
 9 See Complaint ¶ 9. For the reasons set forth in subsection A, supra, this defense should be  
 10 stricken.

11 C. Third Affirmative Defense (Standing).

12 Defendant’s third affirmative defense is that “plaintiff lacks legal standing (contractual  
 13 and statutory standing) to pursue claims for alleged exhibition of the Program or bring this  
 14 Complaint . . . .” Answer at 2. This defense fails as a matter of law. For a Plaintiff to have  
 15 standing, the alleged injury must be “fairly traceable to the defendant’s allegedly unlawful  
 16 conduct and likely to be redressed by the requested relief.” Allen v. Wright, 468 U.S. 737, 751  
 17 (1984). With respect to “legal standing”, Plaintiff “was granted the exclusive nationwide  
 18 commercial distribution rights” to the Program. Complaint at ¶ 9. Plaintiff alone granted  
 19 entities limited sublicensing rights of public exhibition. Id. at ¶ 10. Defendant was not a sub-  
 20 licensee, yet Defendant disseminated the Program at her commercial establishment for  
 21 “commercial advantage or private financial gain,” id. at ¶ 13, to the financial detriment of the  
 22 distributor Plaintiff. Defendant’s conduct is not only “fairly traceable” to the injury, it is  
 23 *specifically* traceable to the injury. In Nguyen, 2010 WL 3749284 at \*4, the district court  
 24 rejected a similar standing defense as being insufficient as a matter of law. There are no  
 25 contractual claims.

26 This defense also fails procedurally because it does not provide fair notice. In Montanez,  
 27 the district court cited to Nguyen and added that the standing defense was also stricken because  
 28 it was a “mere conclusion of law . . . not supported by any facts showing how Plaintiff lacks

1 standing, given the allegations of the Complaint.” Montanez, 2010 WL 5279907 at \*2. The  
 2 defense herein is also a mere conclusion of law. For all of the above reasons, Defendant’s third  
 3 affirmative defense should be stricken.

4 D. Fourth Affirmative Defense (Fault Of Others).

5 Defendant’s fourth affirmative defense is that the damages suffered by Plaintiff, if any,  
 6 “were proximately caused or contributed to by conduct not attributable to defendant; such losses  
 7 or damages were caused by the conduct of plaintiff and others.” Answer at 2. This is not an  
 8 “affirmative defense,” but merely a denial of an element of Plaintiff’s cause of action. Nguyen,  
 9 2010 WL 3749284 at \*5 (striking similar defense); see Integrated Sports Media v. Canseco, Case  
 10 No. 2:10-cv-07392-RSWL-AJW (C.D.Cal. Feb. 23, 2011) (Docket No. 15) (striking actions of  
 11 third parties defense with prejudice). In addition, Defendant does not indicate who the purported  
 12 “other persons or entities” might be and, in this regard, Defendant does not provided Plaintiff  
 13 with “fair notice” of the defense. See Nguyen, 2010 WL 3749284 at \*2.

14 E. Fifth And Sixth Affirmative Defense (Not In Violation).

15 Defendant’s fifth affirmative defense generally denies that Defendant is liable under  
 16 sections 605 and/or 553 and under California Business and Professions Code § 17200. Answer  
 17 at 3. Defendant’s sixth affirmative defense more specifically denies liability under sections 605  
 18 and/or 553. Id. These are not affirmative defenses, they are simple denials. Nguyen, 2010 WL  
 19 3749284 at \*2.

20 F. Seventh Affirmative Defense (Plaintiff Not Aggrieved).

21 Defendant’s seventh affirmative defense is “that plaintiff is not an aggrieved person as  
 22 defined by 47 USC §§ 605, et seq. and 47 USC §§ 553.” Answer at 3. This is not an affirmative  
 23 defense; an affirmative defense denies a plaintiff’s right to recover “*even if the allegations of the*  
 24 *complaint are true.*” Federal Deposit Ins. Corp., 655 F.Supp. at 262 (emphasis added).  
 25 Moreover, even if this defense somehow were applicable, Plaintiff is, by definition, a party  
 26 aggrieved and thus this defense must fail as a matter of law. See 47 U.S.C. § 605(d) (“[T]he term  
 27 “any person aggrieved” shall include any person with proprietary rights in the intercepted  
 28 communication.”). For these reasons, this affirmative defense should be stricken.

1       G. Eighth Affirmative Defense (Estoppel, Waiver And Laches).

2           Defendant's eighth affirmative defense is a statement that "facts will be obtained during  
 3 discovery to show that plaintiff's claims are barred by the equitable doctrines of estoppel, waiver  
 4 and laches." Answer at 3. This is no more than a bare-bones reference to legal doctrines. As  
 5 such, this defense is insufficient in that it does not provide fair notice. Qarbon.com Inc. v. eHelp  
 6 Corp., 315 F.Supp.2d 1046, 1049 (N.D.Cal. 2004) ("A reference to a doctrine, like a reference to  
 7 statutory provisions, is insufficient notice"). In both Nguyen and Montanez, similar bare-bones  
 8 defenses were stricken. See Nguyen, 2010 WL 3749284 at \*2 (striking waiver and estoppel  
 9 defenses); Montanez, 2010 WL 5279907 at \*3 (striking estoppel defense for failing "to specify  
 10 which theory of estoppel is being asserted, and [being] wholly insufficient to provide Plaintiff  
 11 with adequate notice of the facts supporting the defense.").<sup>4</sup>

12           To establish a defense of estoppel, "a party [here, Defendant] must show that the adverse  
 13 party [here, Plaintiff], either intentionally or under circumstances that induced reliance, engaged  
 14 in conduct upon which [the relying party] relied and that the relying party acted or changed [its]  
 15 position to [its] detriment." Directv Inc., v. Weikel, 2005 WL 1243378, \*3 (D.N.J. May 25,  
 16 2005). Defendant has not alleged any "conduct" on behalf of the Plaintiff that in any way  
 17 induced a change in Defendant's position, or that any change in position induced by the Plaintiff  
 18 was to the Defendant's detriment. As such, this affirmative defense should be stricken as legally  
 19 insufficient. Id.; see also Solis v. Couturier, 2009 WL 2022343 at \*6 (defendants did not allege  
 20 any facts that would support an estoppel defense, but rather merely pleaded a legal conclusion).

21           Waiver is an "intentional relinquishment or abandonment of a known right." United  
 22 States v. Perez, 116 F.3d 840, 845 (9th Cir. 1997). In Montanez, the district court struck a  
 23 waiver defense because, "there [was] no indication anywhere in Defendant's pleadings that  
 24 Plaintiff engaged in activity that might constitute . . . a waiver of known rights." A similar  
 25 situation exists in this case. See Montanez, supra, at \*3.

26  
 27           

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<sup>4</sup> A similar defense was stricken in Lowe; the only distinction is that in this case Defendant adds that "facts will be  
 28 obtained during discovery." The Lowe Court struck this defense without prejudice.

1           Laches is an equitable doctrine that applies only to actions in equity. Wyler Summit  
 2 Partnership v. Turner Broadcasting System, Inc., 235 F.3d 1184, 1193 (9th Cir. 2000) (“[u]nder  
 3 California law, laches is available as a defense only to claims sounding in equity, not to claims at  
 4 law.”). In this regard, the only practical application for the laches defense is to Plaintiff’s Unfair  
 5 Business Practices Claim.<sup>5</sup> To establish a claim for laches, Defendant must prove unreasonable  
 6 delay and prejudice. Kling v. Hallmark Cards, Inc., 225 F.3d 1030, 1036 (9th Cir. 2000).

7           In determining whether there has been and unreasonable delay, “courts often ‘borrow’  
 8 the limitations period from the most closely analogous action under state law . . . . If the action is  
 9 filed within the analogous period, there is a ‘strong presumption’ that laches does not apply.”  
 10 Italia Marittima, S.P.A. v. Seaside Transp. Services, LLC, 2010 WL 3504834, \*6 (N.D.Cal.  
 11 Sept. 7, 2010) (internal citations omitted). The statute of limitations for an action under the  
 12 Unfair Business Practices Statutes is four years. Cal. Bus & Prof. Code § 17208.<sup>6</sup> If there is a  
 13 “strong presumption” that a claim filed within an analogous statute of limitations is timely, when  
 14 the claim is filed *three years* prior to the expiration of that statute the presumption goes from  
 15 “strong” to “irrefutable.” Perhaps there could be an argument for “unreasonable delay” if  
 16 Plaintiff brought its action at the three year and 364 day mark, but Plaintiff brought its action  
 17 within *one year* – a full three years earlier than required under section 17208. See Statement of  
 18 Facts, supra.

19           Next, even if the “timeliness” of Plaintiff’s Unfair Business Practices claim were an  
 20 issue, this is only part of the laches analysis. As noted above, Defendant must prove not only an  
 21 unreasonable delay, but also prejudice to herself. See Kling, 225 F.3d at 1036 (9th Cir. 2000).  
 22 As a practical matter, Plaintiff can think of no situation in which there is bona fide prejudice  
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24           <sup>5</sup> Even if laches did apply to the other claims, they are also brought within their respective statutes of limitations.  
 25 See Subsection H, infra.

26           <sup>6</sup> In view of the fact that the Unfair Business Practices claim has its own statute of limitations, there is a question as  
 27 to whether laches is applicable at all. See Russell v. Todd, 309 U.S. 280, 287 (1940) (“From the beginning, equity,  
 28 *in the absence* of any statute of limitations made applicable to equity suits, has provided its own rule of limitations  
 through the doctrine of laches, the principle that equity will not aid a plaintiff whose unexcused delay, if the suit  
 were allowed, would be prejudicial to the defendant.”) (emphasis added).

1 when a Complaint is brought three years prior to the expiration of a corresponding statute of  
 2 limitations. If prejudice could be established at the 1/4 mark of a statute of limitations, it would  
 3 effectively nullify the statute of limitations.

4 For all of these reasons, Defendant's eighth affirmative defense should be stricken.

5 H. Ninth Affirmative Defense (Statutes Of Limitations).

6 Defendant's ninth affirmative defense is that Plaintiff's claims are barred by the statutes  
 7 of limitations. Answer at 3. Notwithstanding the procedural deficiencies with this defense, this  
 8 defense must fail because it cannot succeed on the merits and thus is legally insufficient. The  
 9 statute of limitations for 47 U.S.C. §§ 553 and 605 claims is one year. Directv, Inc. v. Webb,  
 10 545 F.3d 837, 847-48 (9th Cir. 2008). The statute of limitations for conversion is three years.  
 11 See Cal. Code Civ. Proc. § 338(c) (setting statute for conversion at three years).<sup>7</sup> The statute of  
 12 limitations for a section 17200 claim is four years. Cal. Bus. & Prof. Code § 17208. As noted in  
 13 the Statement of Facts, supra, the Program was broadcast on November 14, 2009. Plaintiff filed  
 14 its Complaint on November 12, 2010, see Complaint, which is within each applicable statute of  
 15 limitations. Under no set of circumstances can Defendant's affirmative defense of the statute of  
 16 limitations succeed, and therefore it must be stricken. Soto, 2010 WL 3911467 at \*1; Coyne,  
 17 2011 WL 227670 at\*2 (both striking statute of limitations defense without leave to amend).

18 I. Tenth Affirmative Defense (Statutory Exemptions).

19 Defendant's tenth affirmative defense is that "statutory exceptions under 47 U.S.C. §§  
 20 605(a), 605(b), et seq., apply to bar plaintiff's claims against defendant." Answer at 4. 47 U.S.C.  
 21 § 605 provides:

22 (b) Exceptions

23 The provisions of subsection (a) of this section shall not apply to the interception  
 24 or receipt by any individual, or the assisting (including the manufacture or sale) of  
 25 such interception or receipt, of any satellite cable programming for private

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26 <sup>7</sup> Although not specifically applied to this type of conversion, in Italiani v. Metro-Goldwyn-Mayer Corp., 45  
 27 Cal.App.2d 464, 467 (1941), the court applied a two year statute of limitations to "incorporeal" property rights. As  
 28 discussed infra, because the Complaint was filed within one year of the broadcast of the Program, whether the  
 statute of limitations for conversion is two or three years, Plaintiff's Complaint is timely.

1 viewing if—[(1) the programming involved is not encrypted; and (2)(A) a  
 2 marketing system is not established . . . ].

3 Id. First, Defendant offers no facts in support of her assertion that her actions fall within an  
 4 exception. Moreover, by definition, the exceptions apply only to private viewing. Id. As noted  
 5 by the Nguyen Court in striking similar defense, “[t]he Communications Act explicitly defines  
 6 ‘private viewing’ as viewing that takes place ‘in an individual’s dwelling unit.’” Nguyen, 2010  
 7 WL 3749284 at \*4, quoting 47 U.S.C. § 605(d)(4). Plaintiff alleges that the interception occurred  
 8 in a commercial establishment. Complaint ¶ 12. For purposes of determining the validity of an  
 9 affirmative defense, this allegation is taken as true. Federal Deposit Ins. Corp., 655 F.Supp. at  
 10 262. Therefore, this defense must fail. To the extent Defendant may contend that the viewing  
 11 took place in a “dwelling unit”, this is simply a defense, not an “affirmative defense.” For these  
 12 reasons, Defendant’s tenth affirmative defense should be stricken.

13 J. Eleventh Affirmative Defense (No Intent).

14 Defendant’s eleventh affirmative defense is that if Defendant’s conduct did violate any  
 15 laws:

16 such conduct was neither willful nor for financial gain or commercial advantage;  
 17 rather, any such conduct was for based on a single subscriber reception, for which  
 18 defendants received no payments, was for private use, was innocent and was  
 19 without intent to violate any laws, injure plaintiff or any other entity or gain  
 20 commercial advantage over plaintiff or other entity or person.

21 Answer at 4. This defense is effectively a reiteration of the “good faith” defense. For the  
 22 reasons set forth in subsection L, infra, this defense should be stricken. With respect to the  
 23 contention that the interception was for “private use”, as noted in subsection I, supra, this is  
 24 irrelevant.

25 K. Twelfth Affirmative Defense (Failure To State A Claim).

26 Defendant’s twelfth affirmative defense is that ““plaintiff fails to state facts sufficient to  
 27 constitute a claim for relief against answering defendant.” Answer at 4. “Failure to state a claim  
 28 is an assertion of a defect in Plaintiff’s prima facie case, not an affirmative defense.” Montanez,  
 2010 WL 5279907 at \*2. Montanez, Nguyen, Soto and Coyne all struck a similar defense as  
 being merely a denial of Plaintiff’s cause of action. Montanez, supra; Nguyen, 2010 WL  
 3749284 at \*5; Soto, 2010 WL 3911467 at \*1; Coyne, 2011 WL 227670 at \*2.

1        In addition, as noted in Pepsico, Inc., 2007 WL 2852647, a legal conclusion or theory  
 2 without supporting facts linking that theory to the case at bar “will not withstand a motion to  
 3 strike.” Id. at \*2 (emphasis added). Defendant makes no effort to provide supporting facts  
 4 linking this defense to any of the causes of action in Plaintiff’s Complaint.

5        For these reasons, Defendant’s twelfth affirmative defense should be stricken.

6 L. Thirteenth Affirmative Defense (Good Faith).

7        Defendant’ thirteenth affirmative defense is a contention that if Defendant did violate 47  
 8 U.S.C. §§ 605 or 553, she did so “in a good faith belief in the propriety of her actions [] and  
 9 were not aware and had no reason to believe that their acts constituted a violation of these  
 10 sections.” Answer at 4. In effect, Defendant raises “ignorance of the law” as a defense. It is  
 11 well settled that ignorance of well settled law, even if couched in terms of good faith, is not a  
 12 defense to liability.

13        *It is a common maxim, familiar to all minds, that ignorance of the law will not  
 14 excuse any person, either civilly or criminally; and it results from the extreme  
 15 difficulty of ascertaining what is, bona fide, the interpretation of the party; and  
 16 the extreme danger of allowing such excuses to be set up for illegal acts, to the  
 17 detriment of the public. There is scarcely any law, which does not admit of  
 18 some ingenious doubt; and there would be perpetual temptations to violations  
 19 of the laws, if men were not put upon extreme vigilance to avoid them.*

20        Barlow v. U.S., 32 U.S. 404, 433 (1833) (emphasis added). Moreover, with respect to the  
 21 allegations under 47 U.S.C. §§ 605 and 553, these are strict liability crimes. See 47 U.S.C.A. §  
 22 553(c)(3)(C); 47 U.S.C.A. § 605(e)(3)(C)(iii)(allowing for reduction in damages when it is  
 23 determined that violator was “not aware and had no reason to believe that his acts constituted a  
 24 violation . . .”).<sup>8</sup> In Soto the court struck a similar defense without leave to amend, holding that, “[a]  
 25 mistake of law does not excuse a person from civil liability . . . Thus, even if Defendants can show  
 26 they did not know they were violating the law, their liability is not excused.” Soto, 2010 WL

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27        <sup>8</sup>Defendant also cites to these sections in this defense, and request that damages be reduced pursuant thereto. The  
 28 statutes speak for themselves, and, if it is determined that Defendant was unaware of her violations, the Court has  
 discretion to reduce damages. For purposes of determining the validity of the affirmative defense, however, this  
 statement is irrelevant. At this stage, allegations of the Complaint are taken as true, Federal Deposit Ins. Corp., 655  
 F.Supp. at 262, and Plaintiff has alleged that Defendant acted knowingly. Complaint ¶ 13.

1 3911467 at \*2.

2 M. Fourteenth Affirmative Defense (No Basis For Attorney's Fees).

3 Defendant's fourteenth affirmative defense is that, "there are no legal, factual or  
 4 equitable bases for an award of attorneys' fees . . ." Answer at 5. This is not an "affirmative  
 5 defense", but a denial of Plaintiff's right to recover. See Coyne, 2011 WL 227670 at \*2 (striking  
 6 defenses that denied elements of Plaintiff's causes of action with prejudice). As a matter of law,  
 7 should Plaintiff prevail on either its section 553 or section 605 claim it would be entitled to  
 8 attorneys' fees. See 47 U.S.C. § 553(c)(2)(C) (permitting an award of attorneys' fees); 47  
 9 U.S.C. §605(e)(3)(B)(iii)(mandating an award of attorneys' fees). For this reason, Defendant's  
 10 fourteenth affirmative defense should be stricken.

11 N. Fifteenth Affirmative Defense (Service Of Process).

12 Defendant's fifteenth affirmative defense is that, "service of process was insufficient, in  
 13 that plaintiff did not serve the summons on these answering defendants as required by applicable  
 14 law." Answer at 6. In Nguyen, 2010 WL 3749284 at \*2, a similar bare-bones defense was  
 15 stricken as insufficiently pled.<sup>9</sup> Moreover, this defense fails as a matter of law. Defendant was  
 16 properly served via substitute service on January 14, 2011. See Proof of Service (Docket Nos.  
 17 5). As noted by the Ninth Circuit, "A signed return of service constitutes prima facie evidence  
 18 of valid service which can be overcome only by strong and convincing evidence." Securities &  
 19 Exchange Comm'n v. Internet Solutions for Business, Inc., 509 F.3d 1161, 1166 (9th Cir. 2007)  
 20 (citations/quotations omitted). The burden of overcoming this is a "substantial one." Id. In this  
 21 case, there are no facts presented by Defendant to indicate that this substantial burden may be  
 22 overcome.

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27 <sup>9</sup> In Lowe this defense was stricken without prejudice. The only difference in this case is that Defendant adds  
 28 statutory citations after stating that she was not served "as required by applicable law." Answer at 5. There is still no  
 factual information.

1       O. Sixteenth Affirmative Defense (Rule 11 Sanctions).

2              Defendant's sixteenth affirmative defense is not a defense; rather, it is a statement  
 3 indicating that Defendant will take some future action against the Plaintiff (including seeking  
 4 Rule 11 sanctions). Answer at 5.<sup>10</sup> Although it appears obvious, it is worth stating that, “[a]n  
 5 affirmative defense is a **defense**, not a claim for affirmative relief.” Doyle v. Illinois Central R.  
 6 Co., 2008 WL 4838556, \*3 (E.D.Cal. Nov. 5, 2008) (emphasis in original). Defendant's  
 7 sixteenth affirmative defense is a claim for affirmative relief and thus should be stricken.

8              To the extent that this Court is inclined to consider this affirmative defense as a  
 9 counterclaim, it is specifically denied by Plaintiff and Plaintiff would request that this Court  
 10 direct Defendant to file any counterclaims as required under the Federal Rules of Civil  
 11 Procedure such that Plaintiff may formulate an appropriate response.

12       P. Seventeenth Affirmative Defense (No Conversion).13       Eighteenth Affirmative Defense (No Unfair Business Practices).

14              Defendant's seventeenth and eighteenth affirmative defenses are denials of the elements  
 15 of conversion and of the elements of an unfair business practices claim. “[D]enials of the  
 16 allegations in the Complaint or allegations that the Plaintiff cannot prove the elements of his  
 17 claims are not affirmative defenses.” Nguyen, 2010 WL 3749284 at \*2. For this reason, these  
 18 defenses should be stricken.

19       Q. Nineteenth Affirmative Defense (Personal Jurisdiction).

20              Defendant's nineteenth affirmative defense is “that the Court lacks personal jurisdiction  
 21 over defendant, because of plaintiff's failure to properly serve the summons on defendant.”  
 22 Answer at 6. For these reasons set forth in subsection N, supra, this defense should be stricken.

23       R. Twentieth Affirmative Defense (No Recovery Under Sections 605 And 553).

24              Defendant's twentieth affirmative defense states that “plaintiff cannot recover under both  
 25 Count I and Count II of the Complaint, because it is practically impossible to have, in the alleged

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 27       <sup>10</sup> As a practical matter, this is also an inappropriate method of raising a Rule 11 claim. A Rule 11 motion must be  
 28 made separately from any other motion. Fed.R.Civ.P. 11(b)(2). This is the “safe harbor” provision of Rule 11, and  
 the requirements of this provision are “stringent.” Holgate v. Baldwin, 425 F.3d 671, 677-78 (9th Cir. 2005).

1 one occurrence) both a violation of the Cable law (47 USCS §553) and satellite law (47 USCS §  
 2 605) in one transaction. Plaintiff must elect its remedy.” Answer at 6. This is not an affirmative  
 3 defense, but merely a denial of Plaintiff’s right to recover. Moreover, even assuming *arguendo*  
 4 that Defendant’s legal contention is correct, as a practical matter this is an argument that Plaintiff  
 5 has failed to state a claim upon which relief may be granted. In that regard, for the reasons set  
 6 forth in subsections K, supra, this defense should be stricken. Finally, this defense is misplaced  
 7 as the Federal Rules specifically allow Plaintiff to permit alternative theories of relief, regardless  
 8 of consistency. Fed.R.Civ.P. 8(a)(3); Fed.R.Civ.P. 8(d)(3).

9 U. Twenty-First Affirmative Defense (Reservation Of Rights).

10 Defendant’s twenty-first affirmative defense is a reservation of rights to raise additional  
 11 defenses. Answer at 6. “An attempt to reserve affirmative defenses for a future date is not a  
 12 proper affirmative defense in itself.” See Solis v. Zenith Capital, LLC, 2009 WL 1324051, \*7  
 13 (N.D. Cal. May 8, 2009). “Instead, if at some later date Defendant seek to add affirmative  
 14 defenses, they must comply with Rule 15 of the Federal Rules of Civil Procedure [amended or  
 15 supplemental pleadings].” Id. In Soto, a similar reservation was stricken without leave to  
 16 amend. Soto, 2010 WL 3911467 at \*2. As a result, this affirmative defense should be stricken.

17 II. PLAINTIFF WILL BE PREJUDICED IF THE AFFIRMATIVE DEFENSES ARE NOT  
 18 STRICKEN.

19 Plaintiff has already been compelled to expend time and resources litigating irrelevant  
 20 issues. It is respectfully submitted that requiring such further litigation would further prejudice  
 21 Plaintiff. See Barnes, 718 F.Supp.2d at 1173 (Prejudice exists because, “[i]f the court were to  
 22 permit legally unsustainable affirmative defenses to survive, [Plaintiff] would be required to  
 23 conduct expensive and potentially unnecessary and irrelevant discovery”); Hynix Semiconductor  
 24 Inc. v. Rambus Inc., 2007 WL 4062845, \*3 (N.D.Cal. Nov. 15, 2007) (“To the extent that  
 25 ‘prejudice’ to the movant is required for a motion to strike, being forced to litigate without fair  
 26 notice of the claims and defenses arrayed against you constitutes ‘prejudice.’”).

27 “The prejudice requirement is satisfied if striking the defense would, for example,  
 28 prevent a party from engaging in burdensome discovery, or otherwise expending time and

1 resources litigating irrelevant issues that will not affect the case's outcome." Canadian St. Regis  
2 Band of Mohawk Indians ex rel. Francis v. New York, 278 F.Supp.2d 313, 325 (S.D.N.Y.2003);  
3 see also EEOC v. Bay Ridge Toyota, Inc., 327 F.Supp.2d 167, 173 (E.D.N.Y. 2004) (permitting  
4 affirmative defenses that have no possibility of succeeding will prejudice the Plaintiff by  
5 "needlessly lengthening and complicating the discovery process and trial of this matter.").

6 **CONCLUSION**

7 Defendant's affirmative defenses are factually and legally insufficient under the Federal  
8 Rules of Civil Procedure as well as applicable precedent. In that regard, each of Defendant's  
9 affirmative defenses should be stricken. Therefore, Plaintiff respectfully requests that this Court  
10 grant Plaintiff's Motion to Strike Defendant's Affirmative Defenses, and award such other relief  
11 as may be just and proper.

12 Respectfully submitted,

13  
14 Dated: March 10, 2011

15 /s/ Thomas P. Riley  
16 **LAW OFFICES OF THOMAS P. RILEY, P.C.**  
17 By: Thomas P. Riley  
18 Attorneys for Plaintiff  
19 J & J Sports Productions, Inc.  
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## **PROOF OF SERVICE**

I declare that:

I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is First Library Square, 1114 Fremont Avenue, South Pasadena, California 91030. I am readily familiar with this law firm's practice for collection and processing of correspondence/documents for mail in the ordinary course of business.

On March 10, 2011, I served:

**PLAINTIFF'S NOTICE OF MOTION AND MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES; MEMORANDUM OF POINTS AND AUTHORITIES.**

On all parties referenced by enclosing a true copy thereof in a sealed envelope with postage prepaid and following ordinary business practices, said envelope was duly mailed and addressed to:

N. Maxwell Njelita, Esq.  
NJELITA LAW OFFICES  
436 Fourteenth Street, Suite 1107  
Oakland, California 94612

I declare under the penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct and that this declaration was executed on March 10, 2011, at South Pasadena, California.

Dated: March 10, 2011

/s/ Maria Baird  
**MARIA BAIRD**